

TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document # 01-51

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On May 8, 2003, the Water Pollution Control Board (board) conducted the first public hearing/board meeting concerning the development of amendments to the rules for the nonpoint source pollutant discharge elimination system general permits for confined animal feeding operations in 327 IAC 5-4-3 and 327 IAC 15-15. Comments were made by the following parties:

Rae Schnapp, Hoosier Environmental Council, (HEC)
Cal Jackson, Creighton Brothers, (CBR)
Paul Brennan, Indiana Poultry Association, Inc, (ISPA)
Donita Rodibaugh, Indiana Commission for Agriculture and Rural Development, (ICARD)
Barbara Sha Cox, (BSC)
Chad Frahm, Indiana Farm Bureau, (IFB)
Rick Ward, R & R Ward Farms, Inc., (RRW)
Ken Rulon, Rulon Enterprises, (RE)
John Ulmer, Sierra Club, (SC-U)
Terry Fleck, Indiana Pork Advocacy Coalition, (INPAC)
Glenn Pratt, Sierra Club, (SC-P)
Kim Winger, (KWIN)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: Our main concerns have to do with the public-notice aspects in the emergency rule. We think it's very important for adjoining property owners and local people to have notice that a confined feeding operation is applying to be regulated under the General Permit Rule, because those people would have information as to whether or not the operation qualifies for general permit coverage. (HEC)

Response: IDEM continues to work with all interested parties to attempt to develop a consensus on the issue of proper notification for Notices of Intent for existing CAFOs. IDEM agrees that neighbors of facilities may have information regarding particular facilities that the agency would, otherwise, not be aware of.

Comment: Specific criteria needs to be incorporated into the rule to make it clear under what circumstances a facility is eligible for a general permit. Such criteria should include that the notice of intent is complete and accurate, that the facility has not had a discharge within the past five years, and that any discharge from the facility is not likely to impact a sensitive area. (HEC)

Response: IDEM agrees that the notice of intent must be complete and accurate. Language will be added to the rule to reflect that requirement, which can also be found in federal law at 40 CFR 122.28(b). IDEM also agrees that the rule would benefit from having some specific criteria for determining eligibility for a general permit. We will work with interested persons to attempt to develop a consensus.

Comment: The operator should have to certify that they are following the manure management plan. (HEC)

Response: IDEM believes that the manure management plan required in the existing CFO rule is not specifically needed in the CAFO general permit rule. The operational requirements that apply to a CAFO constitute the content of a manure management plan and are therefore directly enforceable by rule.

Comment: We support the NPDES General Permit Rule approach as it allows multiple sites owned by the same company to have the same permit with the same set of regulatory criteria are in support of the NPDES General Permit Rule. (CBR)

Response: IDEM agrees that the general permit approach will simplify the regulatory process for those individuals with several facilities in the state.

Comment: The general permit will have Indiana's standards on it, and anybody that would have a general permit would be required to fulfill these standards and is committed to doing so. We cannot afford in Indiana to have additional permitting, have individual permits for each of our operations would chase business from our state. I'm not talking about operations that leave because of their poor environmental histories. The board is encouraged to review the rule and make a decision, of course, very thoughtfully, but to recognize the value and impact that having a general NPDES permit would have versus not having that permit and losing that option. (ISPA)

Response: IDEM agrees that the option to obtain a general NPDES permit is a good one for facilities with a good environmental record in the state.

Comment: The main point is that we do agree with the development of a general permit system for an NPDES permit. What is best for the State of Indiana is a climate that fosters profitable lifestyle sectors, and an opportunity for growth. ICARD is asking that you carry out your responsibility of passing sound rules that will protect the environment and also do what is best for the State of Indiana. (ICARD)

Response: IDEM agrees and will continue to work with ICARD and all interested parties to craft a rule that is environmentally protective and provides certainty to the regulated community as to what standards apply to it.

Comment: We are concerned with the impact mega farms could have the surface and ground water, especially our drinking water wells. We are also concerned with the proposal that the sites not receive construction approvals as there are multiple examples of improper construction with the oversight that is currently occurring. We do support some of this from the Indiana Clean Water Coalition. (BSC)

Response: IDEM is committed to developing rules that protect Indiana's environment. IDEM believes it is important that construction requirements be part of the program. Facilities need to be constructed to prevent leakage into drinking water sources. Further, under these proposed rules, discharges, except in very limited circumstances, are prohibited.

Comment: When government regulation is necessary to protect people and property in Indiana, the Indiana Farm Bureau supports rules that are clear, concise, and easily understandable. The Farm Bureau supports the adoption of a CAFO NPDES General Permit Rule by the Water Board today. Emergency adoption now, and eventual final adoption, is necessary to allow IDEM the flexibility needed in properly administering a new federal rule and abiding by Judge Barker's orders from the Save the Valley case. This will also relieve IDEM from being required to issue individual NPDES permits for all federally defined CAFO's. A true general permit for CAFO's for individuals proposing to construct and/or operate CAFO's certified to IDEM of their intent to comply with a general NPDES permit is necessary. (IFB)

Response: IDEM agrees that the general permit approach will allow implementation of the new federal standards in Indiana in a timely way and will allow IDEM to meet the federal court order to issue NPDES permits to all federally defined CAFOs in Indiana.

Comment: The Farm Bureau opposes redundancy in state and federal operating permits for confined operations. Because Indiana has a state regulatory framework for confined feeding operations, certain CAFO's that are also federally defined will have to comply with dual state and federal requirements. The Farm Bureau appreciates the inclusion of language in Section 7 of the rule, 327 IAC 15-15-6, that eliminates this redundancy. (IFB)

Response: IDEM will continue to work to assure that there are not redundancies within the state permitting programs.

Comment: The Farm Bureau supports CAFO construction oversight according to state approved standards. The general permit notice of intent should include a commitment to construct the facility according to state approved construction and performance criteria. The Farm Bureau believes that the construction standards for federally defined CAFO's should be identical to the current criteria for state CFO's. (IFB)

Response: IC 13-18-10 provides for IDEM oversight of construction under the state CFO program. IDEM believes that construction oversight for both CFOs and CAFOs is an important aspect of an environmentally protective program.

Comment: The Farm Bureau believes neighbor and adjoining landowner notification of proposed confined feeding operations is necessary. The rule before you today does allow for notification through the CFO approval process. The general permit notice of intent should also describe how neighbors and adjoining landowners of a facility have been notified of the intent to construct and operate a CAFO. Notification to special interest groups, lobbyists and other activists who are not members of the local geographical community in which a CFO or CAFO is constructed and operated should not be required. (IFB)

Response: IDEM continues to work with all interested parties to determine what level of public notice is appropriate.

Comment: The Farm Bureau believes that the current IDEM interpretation of potentially affected parties goes beyond what is required per the Administrative Orders and Procedures Act notification process. This broad interpretation of Indiana Code 4-21.5-3-5, and the manner in which IDEM notifies parties, needs to be addressed. (IFB)

Response: IDEM agrees that the level of public notice is an issue that must be further discussed with all interested parties prior to finalizing this rule.

Comment: We agree with others that there are frivolous objections and appeals being brought that do not

allege permit violations or water quality violations, causing costly delays in time and attorneys fees for the farmer and IDEM to defend. We would like to tighten up the ability to appeal and object to permits that focus on the permit itself and actual water quality issues and not odor or air or land issues, because those are not something that either IDEM or the Water Board has authority over. The purpose of many of the appeals is to prevent the economic development of Indiana's agriculture industry. The Farm Bureau believes this issue needs to be addressed for all confined feeding operations in the state, not just the largest. (IFB)

Response: IDEM is not aware of a large volume of frivolous objections to its permitting decisions related to CAFOs. The rule specifies that IDEM's decisions are based on water quality issues. IDEM agrees that the rule may benefit from more specificity on this point and there may also be administrative changes to IDEM notification that may also assist in properly informing the public of their rights and limitations under the rule.

Comment: In general, as a swine producer, I support the NPDES permits. (RRW)

Response: IDEM agrees that the NPDES general permit rule is an effective vehicle for addressing the federal requirement for NPDES permits for CAFOs.

Comment: My concern is with the fee structure. Currently I pay \$100 for five years to comply with state regulations concerning my operation. The new regulations asks for \$400 per year over a five-year period. The increase is not only unfair, but it is a huge financial burden on family farms. I would ask that the Water Board consider adding language to the rule that clarifies the fee structure to match the legislative intent in House Bill 533 to \$150 for five years. (RRW)

Response: Fees for NPDES permits are established by the legislature in statute. Currently there is a \$50 application fee for both individual and general NPDES permits. There is also a \$400 annual fee for individual NPDES permits. The statute does not specifically establish an annual fee for general NPDES permits for CAFOs.

Comment: Notification was asked for, for general NPDES permits. I believe that's unnecessary. I believe it is fine for those individuals who have had a discharge and need individual permits. I believe that to notify adjoining landowners can be a good thing, but for those of us that have never had a permit -- or a violation, never had a discharge, I feel it's an unnecessary regulatory burden. (RRW)

Response: IDEM will continue to work with all parties on the issue of public notification for NOIs for existing CAFOS.

Comment: We greatly appreciated the way IDEM has worked with the pork producers and the Farm Bureau to develop a general permit rule that, I believe, makes a lot of sense in a lot of different areas. (RE) (IFB)

Response: IDEM will continue to work with all interested parties on this rulemaking.

Comment: Farms have a zero tolerance for discharge of pollutants, and most farmers in Indiana kill themselves not to drop one drop of manure in the water, because our livelihoods are history. One of the concerns we have is the separation in the general permit rule. IDEM is proposing a construction permit. I would point out to this Board that all 18 major spills in the State of Indiana occurred on farms that had obtained construction permits. That's the reason the court said we have to have NPDES operating permits. You don't spill manure when you build a facility; you spill it when you use it. (RE)

Response: IDEM believes that requiring construction approval is an environmentally sound requirement that serves to prevent problems before they arise, leakage from improperly constructed manure storage systems can lead to contamination of groundwater which is extremely costly to remediate.

Comment: I'm concerned as a farmer from Central Indiana by this apparently lack of concern by public officials. The whole purpose of the legislation was to remove dual regulatory structure as well as to establish the fact that there's not a need for a separate construction permit. We have a zero tolerance for discharge. (RE)

Response: The preliminarily adopted general permit rule aims to remove any overlaps that may exist between the state CFO program and the federally required CAFO NPDES permit program.

Comment: Don't make us certify that we have a deviations from our manure management plans, made a mistake or had a problem. We have to submit the plan anyway; we're audited routinely, more than once a year at this rate. If there's any deviations from that, I have to get written documentation from third-party people that the manure was applied as I said I would apply it. Self-certification, in our minds, does nothing but establish an adversarial role with IDEM, which we really don't want to see. We need their help when there's a problem. Also, we do standard well water testing. Our wells go right underneath our hog manure pits. The standards that are in place do work. Also, contrary to some of the testimony you received today, we don't hire immigrants. I admire these dairy farms that are bringing immigrants to American and letting them live the American dream. Water pollution standards must be based on good policy. (RE)

Response: IDEM will continue to work to establish a fair, effective confined feeding regulatory program

that should allow the industry to prosper and the water quality to be protected.

Comment: I spend a lot more time on paperwork now than five years ago. So, we don't see the need for a separate construction permit. Spills don't happen when you build it. (RE)

Response: IDEM continues to believe that the approval of construction is an important component of an environmentally sound regulatory program.

Comment: In terms of notification to obtain the NPDES permits for existing facilities, we don't see any benefit to that. Everybody knows we're already there. IDEM already has us on the GPS logs. It's public record. (RE)

Response: IDEM will continue to work with all interested parties on establishing an appropriate level of public notification in the permitting process.

Comment: A real concern is with confidentiality. Any information that we have to report to IDEM becomes public record, or so it seems, and we're very concerned about this as we go ahead into this process of rules and developing an ongoing track record of individuals' operations. We have a fertility management system that is actually very proprietary. (RE)

Response: The commentor is correct that information submitted to the agency becomes a public record upon submission, unless the person submitting the information also submits a claim of confidentiality in accordance with rules adopted by this board. Confidentiality rules are found at 327 IAC 12-1.

Comment: All 7500 members of the Sierra Club fully supports the papers that you received from the Indiana Clean Water Coalition. (SC-U)

Response: IDEM appreciates the participation of the Sierra Club, the Clean Water Coalition and all interested parties' participation in this rulemaking.

Comment: In general, we are supportive of a general NPDES permit for concentrated animal feeding operations. But would encourage the Board to enact the one-permit concept that functions very much like general NPDES permits function now. The general permits would state that livestock farms need to be built and operate under the zero discharge standard, and that they should operate under a general permit, as they're nonsite specific -- under the nonsite specific permit process. This would address the issue of removing the construction permit, but would allow the construction standard. It would continue with the performance standard that is already outlined in the current CFO rule. The threat of an individual permit provides adequate incentive for the operator to make the requested changes to construction. After all, they must certify under penalties of perjury that they have built the operation according to IDEM building and construction standards. Our suggestions are consistent with the general permit process. They would keep our farms focused on the performance standard and would allow, again, IDEM an opportunity to address a general or an individual designation on a case-by-case basis. The general NPDES permit process allows public noticing and public input. (INPAC)

Response: IDEM believes that construction approval is a necessary component of the rule. Our experience indicates that elimination of the construction approval requirement may result in a reduction in the effectiveness of current construction oversight and therefore increase impacts on water quality.

Comment: 327 IAC 15-15-10, subsection (3) calls for an annual report to the Department of Environmental Management by the 15th of February each year. This is a new report and one that is a deadline that could be missed. In an effort to not allow those reports to be easily missed, we believe it would be advisable for the agency to send a form to CAFO's of record by January 1st of each year with the form that is being requested and ask them to return that by the 15th of February. (INPAC)

Response: IDEM will continue to work on this issue and determine what would be the best way to assure compliance with the annual reporting requirements.

Comment: 15-15-12 and 15-15-13, address the need to add some language concerning appeal rights. These both talk about determinations by the agency, and set a time frame for gaining a permit at 30 days after the agency has made a determination, and we believe that that language should be augmented with an opportunity for appeal process and should be so noted in the rule. (INPAC)

Response: Any final agency action is appealable under IC 4-21.5 whether specifically noted in the rule or not. However, clarity on the appeal process can be provided in the rule.

Comment: We are concerned with inexperienced operators and operations that are not constructed properly. Also we are concerned about owners with farms in other states that have had many violations and are now considering farm operations in Indiana. We would like Indiana to look at requiring good character provisions in the rule. (KWIN)

Response: Currently, there is no provision in Indiana law that allows IDEM to review past violations or

activities in other states as a pre-condition to receiving a NPDES permit. IDEM does have the authority to review the compliance record of an existing facility in determining whether to renew or revoke a permit.

Comment: To protect the people that are doing a good job and to try to promote credibility of the whole industry, I would strongly encourage you to add good character to the requirements. Word the rule changes based on other state regulations. (SC-P)

Response: Currently, there is no provision in Indiana law that allows IDEM to review past violations or activities in other states as a pre-condition to receiving a NPDES permit.

Comment: Would there have to be statutory authorization for the application of good character? My understanding, in talking to a non-IDEM attorney, is the answer would be no. But having it in the legislature gives you a much stronger base to work from. Where we have a track record of a few people who have caused the vast majority of the real problems. (SC-P)(HEC)

Response: Specific statutory authority exists allowing the agency to consider past convictions for violations of environmental laws only for solid and hazardous waste permits. No such authority has been granted to the agency by the legislature for any other type of permit over which the agency has authority.